

13-4478-cv

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

ERIC GLATT, ALEXANDER FOOTMAN, EDEN ANTALIK, and
KANENE GRATTS, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

-against-

FOX SEARCHLIGHT PICTURES, INC., and
FOX ENTERTAINMENT GROUP, INC.,

Defendants-Appellants.

BRIEF *AMICUS CURIAE* BY NATIONAL EMPLOYMENT LAW PROJECT,
ECONOMIC POLICY INSTITUTE, KNOW YOUR IX, INTERN WORKER ALLIANCE,
YOUNGIST AND ROSS PERLIN

IN SUPPORT OF PLAINTIFFS—APPELLEES PETITION FOR REVIEW

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(c), *Amici Curiae* hereby provide the following disclosure statements:

National Employment Law Project is a non-profit corporation.

Economic Policy Institute is a non-profit corporation.

Know Your IX is a non-profit corporation.

Intern Worker Alliance is an unincorporated volunteer group.

Youngist is a non-profit corporation.

Amici have no parent corporations, and no publicly-held corporation owns 10% or more of any *amici* organization's stock.

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STATEMENTS OF INTEREST OF *AMICI CURIAE*¹

Amici are dedicated to ensuring that the Fair Labor Standards Act, 29 U.S.C. § 201 et seq (“FLSA”) is interpreted consistent with its broad remedial nature so that workers are paid fairly for all work performed, and that employers are not rewarded with free labor just by calling a job an “internship.” *Amici* submit this brief not to repeat the arguments made by the parties, but rather to shed light on the state of internships in the economy today and the impacts they have on the labor market. *Amici* respectfully submit this brief pursuant to Federal Rules of Appellate Procedure 27 and 29 and Second Circuit Local Rules 27-1 and 29-1.

The National Employment Law Project (“NELP”) is a non-profit organization with over 45 years of experience advocating for low-wage and unemployed workers. In NELP’s experience studying and applying the FLSA, any employment arrangement using unpaid labor should be carefully scrutinized under the statute’s expansive definition of the term “employee.”

The Economic Policy Institute (“EPI”) is a non-partisan think tank founded in 1987 to ensure that the interests of working families were considered in

¹ Neither party’s counsel authored this brief, in whole or in part, and nor did either party or party’s counsel contribute money intended to fund the preparation or submission of the brief. No person, including *amici curiae*, their members, or their counsel contributed money that was intended to fund the preparation or submission of the brief.

economic policy. EPI researches economic conditions and advocates for effective labor standards that provide a solid floor for the labor market. Unpaid labor, especially when it is for the benefit of a for-profit business, undermines the ability of all workers to earn a decent living.

Ross Perlin is an independent writer and expert on the issue of internships and unpaid labor. Mr. Perlin worked as an unpaid intern and spent three years researching his book *Intern Nation: How To Earn Nothing and Learn Little In the Brave New Economy*, published in 2011. Mr. Perlin speaks and writes regularly on internships for *The New York Times*, *The Washington Post*, *Time*, and others.

Know Your IX is a non-profit organization dedicated to ending sexual and gender violence, including harassment on the job, against students. Know Your IX provides legal education, resources, guidance, and trainings for students across the country, including in New York, Vermont, and Connecticut.

The Intern Worker Alliance (IWA) is a network of workers challenging unpaid internships through workplace organizing. The network includes current and former interns, labor organizers, cultural producers, and other allies. IWA supports broad employment definitions to afford interns the rights and protections.

{Young}ist is a youth-powered media outlet that was founded in response to the scapegoating of the Millennial generation in the mainstream media. As unpaid

and contingent labor, particularly in the form of internships, have become central features of our generation's economy, it is crucial to challenge the idea that young people's labor has little or no monetary worth.

SUMMARY OF ARGUMENT

The opinion of the three-judge panel in *Glatt v. Fox Searchlight* was based on an idealized conception of the educational nature of internships that does not reflect the majority of unpaid interns' experiences working at for-profit companies today. Those experiences tend to be of limited educational and training value, especially when compared to apprenticeship and co-operative education programs; they also do not provide any significant career advancement benefit.

Part I of this brief reviews the growth of unpaid internships at for-profit companies. Part II argues that colleges and universities have abdicated their responsibility for quality control to ensure such unpaid internships are genuinely educational experiences. Part III concludes that restoring the *Portland Terminal* standard would not reduce internship opportunities, but would give employers a choice to either redesign their unpaid internship programs to satisfy *Portland Terminal*'s criteria, or to begin paying their interns at least minimum wage.

ARGUMENT

I. THE NATURE OF THE FOR-PROFIT INTERNSHIP HAS SHIFTED DRAMATICALLY IN THE PAST DECADES.

A. Unpaid Internship Offerings Have Grown Rapidly, Becoming An Expected Professional Experience Among For-Profit Employers.

Internships were first adopted in the early twentieth century to provide medical students with on-the-job training and education; completion of one soon became mandatory to practice.² Once the medical internship became required, it also became a paid and regulated position. *See* Ross Perlin, *Intern Nation* 30-31 (2011). No such transformation has taken place, however, for internships at for-profit companies over the last thirty years. *Id.*

Estimates suggest that anywhere from one to two million people in the United States work as interns every year, the majority without pay. *Id.* at 28. The percentage of college students completing internships during their college career more than tripled between 1992 and 2014. A 1992 Northwestern University study found 17% of graduating students had held some kind of internship during their college career.³ By 2008, the National Association of Colleges and Employers (NACE) reported this number had risen to 50%, and by 2014, it rose to 59.8%.⁴

² *See* Rosemary Stevens, “Graduate Medical Education: A Continuing History,” 53 *Journal of Medical Education* 1-18 (Jan. 1978).

³ Phil Gardner, Intern Bridge, *The Debate Over Unpaid College Internships* 4 (2010), <http://www.ceri.msu.edu/wp-content/uploads/2010/01/Intern-Bridge-Unpaid-College-Internship-Report-FINAL.pdf>.

⁴ NACE, *2014 Student Survey* 38, available at <http://career.sa.ucsb.edu/files/docs/handouts/2014-student-survey.pdf>.

And as *The Economist* has reported, among this group, “unpaid internships are becoming the norm.” See “Generation I,” *The Economist*, Sept. 6, 2014.

B. Unpaid Internships Are No Longer Limited To Summer, Nor To Students.

While many unpaid internships still take place during the summer when school is out of session, they are also increasingly a part of year-round business operations.⁵ Such internships are often held by recent graduates and by older workers transitioning into new careers.⁶ This is especially true for recent graduates and older workers making a career transition, who represent the fastest-growing segment of interns. Perlin, *supra*, at 177-78. A 2010 survey found 23% of hiring managers received intern applications from experienced workers.⁷

At the other end of the spectrum are so-called *winternships* during students’ winter academic breaks, most of which are unpaid.⁸ Many of these are structured as “virtual” internships, and usually involve remote work. Winter interns may

⁵ For example, a search on August 11, 2015 of leading internship-search website Internships.com showed 834 opportunities within a 20 mile radius of New York City were available for the fall of 2015. Of these, 683 (81.8%) were unpaid.

⁶ Kathy Gurchiek, “Older, Experienced Workers Applying for Internships,” *HR News*, Aug. 30, 2010, <http://www.shrm.org/publications/hrnews/pages/olderinterns.aspx>.

⁷ Gurchiek, *supra*; see also “The 50-Year-Old Intern: Boomers Go Back To The Bottom,” *Fiscal Times*, Mar. 29, 2012.

⁸ Allie Grasgreen, “Growth of Short Term Internships Over Academic Breaks,” *Inside Higher Ed*, February 3, 2012, <https://www.insidehighered.com/news/2012/02/03/growth-short-term-internships-over-academic-breaks>.

never even meet their supervisor. *See* Jenna Wortham, “Virtually There: Working Remotely,” N.Y. Times, February 3, 2013, ED13. Students accept the positions to bolster their resumes, and they are being promoted by college career centers.⁹

These drastic changes reflect how internships have become resume-building positions. Employers and industry groups openly admit that internship experience has become a leading factor in hiring decisions, and it is increasingly expected that new hires will have held multiple internships during and/or after college.¹⁰ But while unpaid internships are seen as a necessary credential because they represent work experience, they frequently fail to provide any significant skills or training.

C. Unlike Apprenticeships and Co-op Programs, Unpaid Internships Are Informal, Often Providing Little Specific Training or Skills.

What makes unpaid internships different from other models of school-to-work transition — notably registered apprenticeship and cooperative education programs — is that internships are usually characterized by a high degree of informality and a lack of specific training or well-defined educational objectives.

Apprenticeships involve “an integral transfer of knowledge,” reports John Ladd, administrator of the U.S. Department of Labor’s Office of Apprenticeship

⁹ Matthew Vogel, “Are Internships The New Temp Agency?,” USA Today College, <http://college.usatoday.com/2015/07/29/are-internships-new-temp-agency>.

¹⁰ *See* Chronicle of Higher Education/Marketplace, *The Role of Higher Education in Career Development: Employer Perceptions* 14, <http://chronicle.com/items/biz/pdf/Employers%20Survey.pdf>.

(hereafter, OA). Perlin, *supra*, at 44. While traditionally limited to trades where you learn by doing, today nearly 400,000 people a year participate in 24,000 registered apprenticeship programs in over 1,000 occupations.¹¹

Registered apprenticeships, unlike internships, must be accredited by the OA, which requires that they provide a minimum of 144 classroom hours of approved institutional training, and at least 2,000 hours of on-the-job training.¹² Apprentices are paid an average of \$13 per hour. Perlin, *supra*, at 44. Graduates earn an average starting salary of \$50,000. *See* OA, “Frequently Asked Questions.”

Co-operative education (co-op) programs allow college students to divide time between a classroom and work setting. Perlin, *supra*, at 96. Even in these more educationally oriented programs, students are paid for their substantive work. *Id.* Professors directly observe and evaluate efforts in the workplace. *Id.*

Apprenticeships and co-ops demonstrate how experiential, on-the-job training can foster learning, so long as the program is structured around clear standards and paired with the kind of rigorous evaluation and close supervision that ensures workers are actually able to advance their careers.

D. Unpaid Internships Do Not Fulfill Their Touted Potential for Career Advancement.

¹¹ Occupations are as varied as aerospace manufacturing, seafaring, cosmetology, law enforcement, green energy and childcare. Ladd, “Apprenticeship 101,” Jan. 28, 2014, <http://blog.dol.gov/2014/01/28/apprenticeship-101-earn-while-you-learn/>.

¹² OA Frequently Asked Questions, <http://www.dol.gov/apprenticeship/faqs.htm>.

Unpaid internships at for-profit companies are also much less likely to lead to employment than paid internship positions. As the National Association of Colleges and Employers (NACE) reported in its *Class of 2014 Student Survey* of more than 40,000 graduates, “Students who have had a paid internship are much more likely to have received a job offer than those students whose work experience has been in an unpaid internship.” *NACE Student Survey, supra*, at 40.

In the for-profit sector, 65.4% of those who had been paid interns at for-profit companies received full-time job offers, whereas only 38.5% of those who were unpaid interns at for-profit companies reported the same result. *Id.* In comparison, virtually the same percentage of those who held no internship, 38.6%, received full-time job offers. *Id.* Starting salary figures among those with job offers also confirm that an unpaid for-profit internship provides little benefit when compared to having no internship. The 38.5% of unpaid for-profit interns who received full-time job offers had an average offer of \$37,612, compared to \$37,277 for their peers who held no internship. *Id.* at 41. This stands in stark contrast to those in paid for-profit internships, whose average offer was \$54,304. *Id.*

In other words, unpaid for-profit internships provided *no hiring advantage* to members of the Class of 2014 when compared with their peers who had held no internship at all, whereas paid for-profit internships offered significant hiring and salary advantages, strongly suggesting that paid for-profit internships lead to a

much greater chance of being hired and achieving long-term career success and financial stability than unpaid for-profit internships.

II. ACADEMIC INSTITUTIONS ARE NOT PROVIDING QUALITY CONTROL TO ENSURE INTERNSHIPS' EDUCATIONAL VALUE.

A. Accreditation Standards Are Largely Ignored For Internships.

Current university policies reveal that many do not play any effective gatekeeper role. Higher education accreditation agencies like the New England Association of Schools and Colleges (NEASC), which oversees all colleges and universities in New England, lay out specific oversight standards for awarding credit that are routinely ignored when it comes to internships.”¹³ An Intern Bridge survey found that while 90% of universities offered academic credit for internships, only half of universities had put quality measures in place.¹⁴

Few faculty members provide oversight of internships.¹⁵ Instead, internships are usually managed, if at all, by campus career centers, which typically have only a small staff and focus on students' labor market readiness. Perlin, *supra*, at 87.

¹³ NEASC, Standards for Accreditation 10, https://cihe.neasc.org/downloads/Standards/Standards_for_Accreditation.pdf.

¹⁴ Phil Gardner, *Reactions on Campus to the Unpaid Internship Controversy* 7, 2009, <http://www.ceri.msu.edu/wp-content/uploads/2009/10/Reaction-on-Campus-to-the-Unpaid-Internship-Controversy-Whitepaper.pdf>.

¹⁵ Among 8,939 respondents at 234 colleges, only 15 percent of those getting credit reported that an adviser or faculty member visited their work site. Kevin Carey, “Giving Credit, but Is It Due?” N.Y. Times (op-ed), <http://www.nytimes.com/2013/02/03/education/edlife/internships-for-credit-merited-or-not.html>.

For example, UC Berkeley allows students to receive academic credit for their internship through an online course managed and run by the career center.¹⁶

NEASC also requires “demonstrable academic content” that is comparable to institutional learning experiences when awarding credit for internships. *NEASC* at 11. But these expectations are simply ignored in most unpaid internships today. One survey of larger schools found that only 27.6 percent of school-supported internships were associated with classroom experience.¹⁷ Evaluations of learning are scant, often based on a short form filled out by a supervisor. Carey, *supra*.

Sometimes schools’ primary interest in awarding credit is not educational but financial, as many require their students pay the school directly to receive academic credits for unpaid internships. Up until spring 2015, George Washington University – named by The Princeton Review as the #1 College for Internships in 2015 – charged students \$1,300 for “elective credits” for internships.¹⁸ At Bellarmine University and the University of Pittsburgh, students were required to

¹⁶ See “Independent U.S. Summer Internship Credit Option,” UC-Berkeley Career Ctr., <https://career.berkeley.edu/Internships/AcadCreditSummer>.

¹⁷ *Unpaid Internships: A Survey of the NACE Membership*, at [http://www.d.umn.edu/careers/faculty/Unpaid%20Internships_%20A%20Survey%20of%20the%20NACE%20Membership\[1\].pdf](http://www.d.umn.edu/careers/faculty/Unpaid%20Internships_%20A%20Survey%20of%20the%20NACE%20Membership[1].pdf).

¹⁸ GWU recently changed its policy in response to a student-led campaign. The price has now dropped to \$50. See Jacqueline Thomsen, “After student-led push, GW slashes costs for internship credit,” *GW Hatchet*, Feb. 9, 2015.

pay as much as \$8,724 and \$6,558, respectively, for internship credits.¹⁹ Some schools require unpaid internships for graduation or certain majors, making students pay to intern, off-campus, without pay.²⁰

B. Academic Credit Is Often Awarded In Name Only

In many cases colleges and universities award academic credits for internships that are credits in name only, as they do not even count toward graduation or degree requirements. George Washington University's elective credits, for example, do not count toward graduation. "Elective Internship," G.W. U. Ctr. for Career Services, <http://careerservices.gwu.edu/elective-internship>. Certain programs at New York University provide credit if the internship is related to the major, but they do not count toward degree requirements. *See* "Internships," NYU College of Arts & Sciences, <http://cas.nyu.edu/page/internships>. Until 2013, Columbia University allowed most undergraduates to receive "registration credits" which did not count toward graduation.²¹ Barnard College still awards such credits,

¹⁹ Blair Hickman et al, "The Price of an Internship," *ProPublica*, Dec. 20, 2013, <http://projects.propublica.org/internships/>.

²⁰ *E.g.*, SUNY-New Paltz requires that journalism majors complete an internship, <http://www.newpaltz.edu/digitalmediajournalism/internships/credit.html>. *See also*, *e.g.*, U.S. News & World Report, "10 Colleges with the Most Interns," June 6, 2015 ("At Elmira College in New York, students are expected to complete at least 240 hours of career experience" to graduate.)

²¹ *See* "Internship Credit," Columbia Univ. School of General Studies, <http://bulletin.columbia.edu/general-studies/undergraduates/additional-academic-opportunities/internship-credit>.

though they call them “co-curricular credits.” *See* “Internship Co-Curricular Credit,” Barnard College Career Development, <http://barnard.edu/node/24781>.

In more extreme cases, academic credit has been sold wholesale by colleges to for-profit internship placement companies – such as at Menlo College, whose career center entered into an arrangement with internship placement company University of Dreams to sell academic credit at \$45 a head, grossing the college \$50,000. Perlin, *supra*, at 148.

The fact that major educational institutions such as Columbia and George Washington University have provided only fake credit to their students suggests that those charged with designating whether courses deserve credit – generally, the faculty – will not sign off on the dubious educational value of an unpaid internship.

C. Many Top Schools Do Not Offer Credit But Have Workarounds.

Many leading colleges and universities offer no academic credit for internships whatsoever, including Yale, Harvard, Princeton, Dartmouth and the University of Pennsylvania, Wellesley and Duke.²² Even many of these schools

²² “Academic Credit,” Yale Office of Career Strategy, <http://ocs.yale.edu/content/academic-credit>; “Internship Course Credit,” Harvard Univ. Office of Career Services, <http://ocs.fas.harvard.edu/internship-course-credit>; “Frequently Asked Questions,” Princeton Univ. Office of Int’l Programs, <http://www.princeton.edu/oip/iip/faq/#11>; “Policies Governing Internships,” Univ. of Pennsylvania Coll. of Arts & Sciences, <http://www.college.upenn.edu/node/2404>; “Internships and FAQ,” Dartmouth Career Services, <http://www.dartmouth.edu/~careerblog/2012/12/internships-and-faq-what-to-do-if-youre-asked-about-academic-credit/>; “Internships for Credit,”

have been pressured to develop workarounds as alternatives to awarding fake credit, as a direct response to the demand by employers that students receive “academic credit.” The University of Pennsylvania will offer a transcript “notation” of an internship – but *only* if the employer requires that the student receives academic credit as a condition of employment. “Policies Governing Internships,” University of Pennsylvania, *supra*. If an employer demands evidence of credit, Yale will give students a letter stating the University’s policy and noting students are *eligible* to take an independent study *after* the internship, and claims most employers accept this “without reservation.” *See* Yale Career Strategy, *supra*.

But some demand even more: SUNY-Albany warns students that they may be urged to obtain a ‘Hold Harmless’ agreement from SUNY, to indemnify the employer.²³

III. ENFORCING *PORTLAND TERMINAL* WOULD INCREASE THE VALUE OF INTERNSHIPS TO INTERNS AND EMPLOYERS.

Reaffirming *Walling v. Portland Terminal*, 330 U.S. 148 (1947) would not require eliminating all unpaid internships. Rather, employers will have a choice: either redesign internships to satisfy *Portland Terminal*’s criteria, or pay interns at

Wellesley Coll., <http://www.wellesley.edu/cws/internships/internship101/credit>; Duke Univ., <https://studentaffairs.duke.edu/career/about-us/policies/duke-internship-credit-policy>.

²³ *See* “Frequently Asked Questions,” SUNY-Albany Career Services, http://www.albany.edu/career/internships/types_of_internships.shtml.

least minimum wage. Under *Portland Terminal*, employers would provide close supervision of an unpaid interns' work. Such supervision would ensure that the employer was not deriving any "immediate advantage" from work done by the interns. It would also yield benefits for employers, however, who could road-test potential employees without paying them, in a way that ensures supervisors have a first-hand sense of their interns' skills. The *Portland Terminal* option would appeal to employers who foresee hiring their interns as full-time employees, as was the case in the railway brakemen training program in *Portland Terminal*.

The alternative, paying interns at least a minimum wage, would have the potential for similar training and educational benefits to employees, but without as much of a supervisory cost. Survey data suggests paid opportunities would be improved significantly, as paid interns currently receive significantly more training and career benefits than unpaid interns do, *NACE Student Survey*, *supra*, at 40.

At current federal minimum wage (\$7.25 an hour) a 10-week, 40-hour-per-week internship would cost an employer \$2,900 in wages. By comparison, an average entry-level hire can cost between \$5,700 to \$8,900 to recruit, plus \$1,000 to train.²⁴ Thus paid internships remain substantially cheaper than full hires, giving employers a cost-effective way to vet potential hires.

²⁴ Nathan Parcells, "How to Convert Your Unpaid Intern Program into a Paid Program," <https://www.looksharp.com/guides/how-to-convert-your-unpaid-internship-program-into-a-paid>.

Compensation also helps diversify the workforce, allowing companies to attract interns of all backgrounds. NBC Universal began paying interns in 2013 and reported a big increase in applicant diversity; it now attracts many who could not afford to relocate to New York.²⁵ InternMatch's Nathan Parcells argues that by paying interns, companies can generate three times as many applicants.²⁶

IV. CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant Plaintiffs' petition for rehearing or rehearing *en banc*.

Respectfully submitted,

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²⁵ "NBC Universal's New Paid-Intern Policy Yields More Diversity," *MadameNoire*, <http://madamenoire.com/295556/nbcuniversals-new-paid-intern-policy-yields-diversity/>.

²⁶ Suzanne Lucas, "A Strong Case for Why You Should Pay Your Interns," *Inc.*, <http://www.inc.com/suzanne-lucas/a-strong-case-for-why-you-should-pay-your-interns.html>.

Certificate of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 15 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14-point font.

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